Supreme Court, U.S.
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No. 89-1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

NICHOLAS T. KITSOS,

Petitioner,

vs.

JOHN C. O'MALLEY, ADMINISTRATOR,
ATTORNEY REGISTRATION
AND DISCIPLINARY COMMISSION
OF THE SUPREME COURT OF ILLINOIS,

Respondent.

**On Petition For A Writ Of Certiorari
To The Supreme Court Of Illinois**

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether Petitioner has failed to establish federal jurisdiction pursuant to 28 U.S.C.§1257(3).

II. Whether Disciplinary Rule 1-102 of the Illinois Code of Professional Responsibility is vague, indefinite and uncertain to the extent that disciplinary proceedings based thereon violate the Due Process requirement of the Fourteenth Amendment.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
INTRODUCTION	2
CONSTITUTIONAL PROVISIONS AND RULES INVOLVED	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	6
ARGUMENT	8
I. PETITIONER HAS FAILED TO ESTABLISH FEDERAL JURISDICTION PURSUANT TO 28 U.S.C.§1257(3). .	8
II. DISCIPLINARY RULE 1-102 IS NOT VAGUE, INDEFINITE AND UNCERTAIN SUCH THAT DISCIPLINARY PROCEEDINGS BASED THEREON VIOLATE THE DUE PROCESS REQUIREMENT OF THE FOURTEENTH AMENDMENT	13
CONCLUSION	16

TABLE OF AUTHORITIES

CASES: Page

Brinkerhoff-Faris Trust Co. v. Hill,
281 U.S.673 (1930). 11

Broadrick v. Oklahoma,
413 U.S.601 (1973). 14

Connally v. General Construction Co.,
269 U.S.385 (1926). 14

Giacco v. Pennsylvania
382 U.S.399 (1966). 14

Great Northern Railway Co. v. Sunburst Oil & Refining Co.,
287 U.S.358 (1932). 9

In re Ruffalo,
390 U.S.544 (1967). 7, 13

Missouri ex rel. Missouri Insurance Company v. Gehner
281 U.S.313 (1930). 6, 8

OTHER AUTHORITIES:

Ill. Rev. Stat. ch.110A, Art. VIII, Rule 1-102 (1980) . . . . . .passim

Ill. Rev. Stat. ch.110A, para.753(b), (c) and (e) (1985) . .passim

U.S. Const. amend. XIV,§1 . . . . .passim

APPENDIXES

Page

Appendix A: United States U.S. Const.amend. XIV, §1 . . . . A-1

Appendix B: United States Code §1257 (3). A-2

Appendix C: Illinois Code of Ill. Rev. Stat. ch. 110A, Art. VIII Rules 1-102 (1980), 9-102(a) A-3

Appendix D: Supreme Court of Ill. Rev. Stat. ch. 110A, para. 753(b), (c) and (e) (1985). . . . A-4

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INTRODUCTION

For the sake of brevity, Respondent will not include sections in this brief for opinion below and jurisdiction as they are discussed in the sections for statement of the case and argument, respectively.

CONSTITUTIONAL PROVISION AND RULES INVOLVED

U.S. CONST.
amend. XIV, §1. . . . .see Appendix A

United States Code,
28 U.S.C.§1257(3) . . .see Appendix B

Ill. Rev. Stat. ch. 110A, Art. VIII,
Rules 1-102, (1980)
9-102 (1987). . . . . .see Appendix C

Ill. Rev. Stat. ch. 110A, para. 753(b)
(c) and (e) (1985). . .see Appendix D

STATEMENT OF THE CASE

On February 25, 1987 the Administrator of the Attorney Registration and Disciplinary Commission filed a complaint against Petitioner pursuant to Rule 753(b) of the Supreme Court of Illinois. (See Appendix D). The complaint charged Petitioner with converting and commingling client funds amounting to $4,033.24, engaging in illegal conduct involving moral turpitude and engaging in conduct involving dishonesty, fraud, deceit and misrepresentation.

On May 19, 1987 a hearing on the Administrator's complaint was conducted before the Hearing Board pursuant to Rule 753(c) of the Supreme Court of Illinois. (See Appendix D). Petitioner was represented by counsel at the hearing and participated in the proceedings before the Hearing Board.

On November 16, 1987 the Hearing Board issued a report and recommendation finding that Petitioner was guilty of the conduct alleged in the Administrator's complaint and recommending that petitioner be suspended from the practice of law for one year.

On December 4, 1987 Petitioner appealed the finding and recommendation of the Hearing Board by filing exceptions in the Review Board pursuant to Rule 753(e) of the Supreme Court of Illinois. (See Appendix D).

On April 13, 1988 the Review Board issued its Report and Recommendation. The Review Board concurred with the findings of fact and conclusions of law of the Hearing Board, but recommended that Petitioner be suspended from the practice of law for a period of six months.

On May 3, 1988 Petitioner appealed the findings and recommendation of the Review Board by filing exceptions in the Supreme Court of Illinois pursuant to Rule 753(e) of the Supreme Court of Illinois. (See Appendix D).

On January 18, 1989, after considering briefs and oral arguments, the Supreme Court of Illinois issued its opinion that Petitioner be suspended from the practice of law for one year.

On February 6, 1989, Petitioner filed a Petition for Rehearing with the Supreme Court of Illinois. On April 3, 1989, the Supreme Court of Illinois denied the petition.

On April 6, 1989, Petitioner filed a Motion to Stay Mandate with the Supreme Court of Illinois so as to permit him to seek review in the Supreme Court of the United States. On April 11, 1989 the Supreme Court of Illinois issued an order

allowing Petitioner's motion.

On June 30, 1989, Petitioner served Respondent with copies of his Petition for Writ of Certiorari to the Supreme Court of the United States.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari to Supreme Court of Illinois should be denied for the following reasons:

First, it is well established that the United States Supreme Court is vested with jurisdiction only where a federal question was properly presented in the state court proceedings. Missouri ex rel. Missouri Insurance Company v. Gehner, 281 U.S. 313, 320 (1930). In the instant case, Petitioner failed to raise any constitutional claim in any of the proceedings before the Hearing Board, Review Board or Supreme Court of

Illinois. Petitioner did not provide the Supreme Court of Illinois an opportunity to consider or decide any federal question. As a result, Petitioner failed to preserve any federal question for review by this Court.

Second, Petitioner was not denied due process of law by reason of vagueness of Rule 1-102. Petitioner was essentially charged with conversion of a client's funds in the amount of $4,033.24. His theft violated Rule 1-102 of the Code which prohibits illegal activity involving moral turpitude and dishonest conduct. Petitioner received notice of the charges, was given an opportunity to defend, and did defend himself against those charges in complete compliance with the due process requirements mandated in In re Ruffalo, 390 U.S. 544 (1968).

ARGUMENT

I. PETITIONER HAS FAILED TO ESTABLISH FEDERAL JURISDICTION PURSUANT TO 28 U.S.C.§1257(3).

Petitioner has failed to demonstrate in his petition that this Court has jurisdiction to review the judgment of the Supreme Court of Illinois.

Petitioner alleges that his right to due process under the Fourteenth Amendment of the United States Constitution (See Appendix A) was violated. This Court has stated that it will not consider claims which were not properly presented in the highest court of the state. Missouri ex rel. Missouri Insurance Company v. Gehner, 281 U.S. 313, 320 (1930).

Generally, a constitutional question is raised too late even if first raised in a petition for rehearing in the highest level state court. Great Northern Railway Co. v. Sunburst Oil &

Refining Company, 287 U.S. 358, 366 (1932). In this case, Petitioner did not even raise a federal question in his petition for rehearing filed with the Supreme Court of Illinois. Petitioner first raised any federal constitutional claim in the petition for Writ of Certiorari he filed in this Court. As a result, he failed to properly establish the jurisdiction of this Court to review the decision of the Supreme Court of Illinois.

To invoke the jurisdiction of this Court to review a constitutional claim not timely presented to the Supreme Court of Illinois, Petitioner must establish that his case fits within an exception to the general rule. Id. at 367. Petitioner has not set forth any authority asserting that he fits within an exception. The two exceptions discussed in Great Northern Railway are, first, where the

constitutional question is considered and decided by the state court, and second, where the grounds of the decision supply a new and unexpected basis for a claim by the defeated party of the denial of a federal right.

The first of these exceptions does not apply to Petitioner because his constitutional claims were never raised at the state court.

The second exception does not apply because the opinion of the Supreme court of Illinois did not contain anything new or unexpected. The Court drew the same conclusions of fact and law as the Hearing Board and the Review Board. The Court's opinion that suspension of one year was warranted is identical to the recommendation of the Hearing Board and much less than the disbarment originally sought by the Administrator.

The only other possible exception under which Petitioner may invoke federal jurisdiction is that the additional federal claim was raised at the first opportunity, though otherwise untimely. Brinkerhoff-Faris Trust Co. v. Hill, 281 U.S. 673, 678 (1930). In Brinkerhoff-Faris, however, the federal claim was raised in the petition for rehearing, whereas here it was not. Furthermore, the Court in Brinkerhoff-Faris found that the plaintiff was unable to avail itself of a remedy which was established subsequent to the commencement of litigation. Petitioner is not here raising his constitutional claim at the first opportunity. Petitioner neglected to raise any such claims at any point during the disciplinary proceedings, although he had the opportunity to do so at every stage of the proceedings.

Petitioner claims that his neglect in presenting his constitutional claim was due to his denial of a forum in which to raise them. However, Petitioner fails to specify how he was denied any opportunity to present them. In fact, Petitioner was not denied an opportunity to raise such claims. He simply failed to do so.

Clearly, Petitioner could have presented his constitutional claim before the Hearing Board, Review Board, or the Supreme Court of Illinois. Petitioner did participate in the proceedings and raised several claims that the Hearing Board and Review Board erred. His claims, however, were of a factual and evidentiary nature, generally limited to the issue of the burden of proof.

II. DISCIPLINARY RULE 1-102 IS NOT VAGUE, INDEFINITE AND UNCERTAIN SO AS TO VIOLATE PETITIONER'S CONSTITUTIONAL RIGHT TO DUE PROCESS.

Petitioner now alleges, for the first time, that Rule 1-102, of the Illinois Code of Professional Responsibility is vague and that his right to due process was violated. Petitioner's argument is without merit.

In In re Ruffalo, this Court stated that an attorney is a disciplinary proceeding is entitled to due process to the extent that he receive notice of the charge and an opportunity to be heard. 390 U.S. 544, 550 (1967). Both requirements have been satisfied.

Clearly, Rules 1-102(a)(3) and (4) of the Illinois Code of Professional Responsibility, which prohibit attorneys from engaging in illegal conduct involving moral turpitude and dishonesty, fraud, deceit or misrepresentation, are

not so vague that men of common intelligence must necessarily guess at its meaning. See Connally v. General Construction Co., 269 U.S. 385 (1926). Nor is it so vague and standardless that it leaves the public uncertain as to the conduct it prohibits. See Giaccio v. Pennsylvania, 382 U.S. 399, 402 (1966). It is frivolous to suggest that the disciplinary rules fail to give adequate warning of proscribed activities. Broadrick v. Oklahoma, 413 U.S. 601 (1973).

Furthermore, Petitioner was not disciplined for violating Rule 1-102 alone. Petitioner was charged with conversion of client funds amounting to $4,033.24. Petitioner's theft of funds was illegal conduct involving moral turpitude and was dishonest. The complaint filed by the Administrator against Petitioner clearly set forth the

facts which established conversion. The charges against Petitioner were not vague and uncertain, but clear and specific.

Petitioner offers no legal authority to support of his assertion that Rule 1-102 is vague, uncertain and indefinite. By raising a constitutional claim at this late date, it is clear that he is attempting to distract attention from the real basis for his discipline, his conversion of client funds. In effect, Respondent is utilizing the Writ of Certiorari Petition to delay the commencement of his suspension.

CONCLUSION

For the reasons set forth above, Respondent respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES CONSTITUTION
AMENDMENT XIV.

U.S. CONST. amend. XIV, §1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX B

28 U.S.C.§1257(3).

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

APPENDIX C

Ill. Rev. Stat. ch. 110A, Art. VIII, Rules 1-102 (1980) and 9-102(a)(1987)

RULE 1-102. Misconduct

(a) A lawyer shall not

(1) violate a disciplinary rule:

(2) circumvent a disciplinary rule through actions of another;

(3) engage in illegal conduct involving moral turpitude;

(4) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation; or

(5) engage in conduct that is prejudicial to the administration of justice.

RULE 9-102. Preserving Identity of Funds and Property of a Client

(a) All funds of clients paid to a lawyer or law firm, including funds belonging in part to a client and in part presently or potentially to the lawyer or law firm, shall be deposited in one or more separate identifiable trust accounts in a bank or savings and loan association maintained in the State in which the law office is situated.

APPENDIX D

RULE 753(b), (c) and (e) of the Supreme Court of Illinois

Ill. Rev. Stat. ch 110A, para. 753 (b), (c) and (e)(1985)

(b) Filing a Complaint. A complaint voted by the Inquiry Board shall be prepared by the Administrator and filed with the Hearing Board. The complaint shall reasonably inform the attorney of the acts of misconduct he is alleged to have committed.

(c) Hearing Board.

(1) There shall be a Hearing Board. It shall consist of not less than 21 members of the bar of Illinois. The members of the Board shall be appointed by the Commission to serve annual terms as commissioners of the court. The Commission may appoint such additional members of the Board as it deems necessary to carry on the work of the Board.

(2) The Hearing Board may act in panels of not less than three members each, as designated by the Commission. The Commission shall also designate one of the members of each panel as chairman. The majority of a panel shall constitute a quorum and the concurrence of a majority shall be necessary to a decision. In the absence of the chairman of a panel at a hearing, the members present shall designate one of their members as acting chairman.

(3) The hearing panels shall conduct hearings on complaints

filed with the Board and on petitions referred to the Board. The panel shall make findings of fact and conclusions of fact and law, together with a recommendation for discipline, dismissal of the complaint or petition, or nondisciplinary suspension.

(4) The Board shall set a date for hearing on a complaint not earlier than 21 days after the filing of the complaint. A copy of the complaint and a notice of the date for hearing shall be served on the respondent not less than 14 days prior to the date set for hearing.

(5) Proceedings before the Board shall be conducted according to the practice in civil cases as modified by rules promulgated by the Commission pursuant to Rule 751(a)

(6) Except as otherwise expressly provided in these rules, the standard of proof in all hearings shall be clear and convincing evidence.

(e) Review Procedure.

(1) Reports of the Hearing Board shall be reviewed by the Review Board upon the filing of exceptions by either party. The respondent or the Administrator may file exceptions to the report of the Hearing Board with the Review Board within 21 days after service of the report. If neither the respondent nor the Administrator files exceptions to the Hearing Board report, and the report recommends action by the

court, the report shall be filed with the court and submitted as an agreed matter. The court may approve the Hearing Board report, refer the case to the Review Board, or order briefs and oral argument.

(2) The parties shall not be entitled to oral argument before the Review Board as of right, but the Board may, in its discretion, permit or require briefs or oral arguments or both.

(3) The Review Board may approve the findings of the Hearing Board, may reject or modify such findings as it determines are not established by clear and convincing evidence, may make such additional findings as are established by clear and convincing evidence, may approve, reject or modify the recommendations, may remand the proceeding for further action or may dismiss the proceeding. A copy of the report or order of the Review Board shall be served on the respondent and the Administrator.

(4) If the Review Board concludes that disciplinary action is required, the report of the Board shall be filed with the court. If in such instance the Review Board affirms the findings and recommendations of the Hearing Board without change, the report of the Hearing Board may be transmitted to the court by the Review Board with its order of affirmance and no separate report need be filed by the Review Board.

(5) Within 21 days after service

of the order or report on him, the respondent may file exceptions with the court or a motion that the exceptions filed to the Hearing Board stand as exceptions to the report or order of the Review Board.

(6) The Administrator may petition the court for leave to file exceptions to the order or report of the Review Board. The petition shall be filed with the court, and a copy served on the respondent, within 21 days after service of the order or report of the Review Board on the Administrator. The proposed exceptions shall be attached to the petition. If the Administrator is granted leave to file exceptions, the order or report of the Review Board shall be filed with the court. The respondent may answer the exceptions within 21 days after service on him of a copy of the order of the court granting the Administrator leave to file the exceptions. The clerk shall not docket the Administrator's petition for leave to file exceptions unless the petition is allowed by the court.

(7) The parties shall not be entitled to oral argument before the court as of right, but the court may, in its discretion, permit or require briefs or oral argument or both. If the court permits or requires briefs, the brief of the party filing exceptions to the order or report of the Review Board, or moving that the exceptions filed to the

Hearing Board report stand as exceptions to the order or report, shall be filed within 35 days of the date of the entry of the order of the court permitting or requiring briefs. Briefs shall be prepared, filed and served in compliance with Rules 343 and 344.
(Amended, effective August 1, 1985).